

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

APR 25 1974

74-1366

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
NEW YORK, NEW YORK

-----x
JOHN CHARLES FERRANTO,

Appellant

APPEAL NUMBER

vs.

74-1366

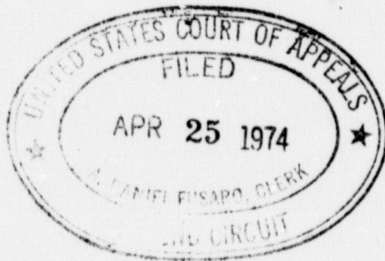
UNITED STATES OF AMERICA,

Appellee
-----x

BRIEF OF THE APPELLANT

and Appendix

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK BROOKLYN NEW YORK 74-C-109



John Charles Ferranto, Appellant
United States Penitentiary
Atlanta, Georgia 30315

74054

PAGINATION AS IN ORIGINAL COPY

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PRELIMINARY STATEMENT

This appeal emminates from the denial of a Section 2255 Motion to vacate sentence, ORDER of denial dated January 28, 1974 (Attached as Exhibit I), and a succeeding Motion to Vacate Sentence with the ORDER of denial dated February 27, 1974. The subsequent motion filed on similar grounds was based on the Court's reiteration of information from the pre-sentence investigation report which is erroneous. Even though the Court alluded to the information in the pre-sentence investigation report to impose the original sentence, as well as denying the relief sought in the 2255 Motion from which this appeal is taken, and the denial again was based on the erroneous information in the pre-sentence report. The Court still failed to grant the appropriate relief of at least an Evidentiary Hearing whereby a proper, factual pre-sentence investigation report could be prepared and presented for consideration at a new sentencing proceedings.

STATEMENT OF FACTS

Appellant was sentenced to a term of fifteen (15) years, after a plea of guilty to Bank Robbery, on March 3, 1972. His co-defendant, who was permitted to plead guilty to two (2) bank robberies received a sentence of ten (10) years on each bank, concurrent with each other. In the context of the presentence investigation report, information was obtained pertaining to the prior 'criminal record' of this appellant from the file of the F.B.I., and supplmented with a cursory investigation by the Probation Officer. The information

contained in the pre-sentence investigation report, and upon which the Court relied heavily to impose the sentence, was basically untrue and distorted, as outlined in the Section 2255 Motion submitted to the Court, and warranted an Evidentiary Hearing, where this appellant would have an opportunity to rebut the erroneous information contained in the report.

QUESTION PRESENTED FOR REVIEW

WAS IT ERROR FOR THE DISTRICT COURT TO DENY THIS APPELLANT AN EVIDENTIARY HEARING TO DETERMINE THE VALIDITY OF HIS ALLEGATIONS PERTAINING TO THE ERRONEOUS INFORMATION CONTAINED IN THE PRESENTENCE REPORT, ESPECIALLY WHEN THE COURT, IN IT'S ORDER OF DENIAL SPECIFICALLY RELATED TO THE CRIMINAL RECORD OF THIS APPELLANT AS CONTAINED IN THE PRE-SENTENCE INVESTIGATION REPORT?

ANSWER

The appellant states that it is well settled in a multitude of cases where information that is erroneous, and is used to enhance a sentence, demands a remand for reconsideration of the sentence imposed with a true and accurate presentence investigation report.

Appellant states that the basis of the Tucker decision, and subsequent decisions thereto, relate primarily around constitutionally unsound prior convictions, that were contrary to the holdings of Gideon vs. Wainwright, 372 U.S. 335 (1963), it also relates in United States vs. Tucker, 404 U.S. 443, 92 S.Ct. 589 (1972):

(W)e deal here not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude.

The Court further stated that to assume the trial Court would not have imposed a different sentence on Tucker had it known that two (2) of his prior convictions were invalid, would be "callous."

A number of cases have arisen since Tucker, all reaffirming it's rule; for example see Franchi vs. United States, 464, F.2d 1035 (5th Cir. 1972); Davis vs. Wainwright, 462 F. 2d 1354 (5th Cir. 1972); Garrett vs. Swenson, 459 F. 2d 464 (8th Cir. 1972); Craig vs. Beto, 458 F. 2d 126 (3rd Cir. 1972); United States vs. Picaro, 464 F. 2d 215 (1st Cir. 1972).

The Sentencing Court where the 2255 motion is brought must resolve the question of the validity of the information used by the Court in sentencing the petitioner, because the motion before the Court is not on information used to impose the sentence, but on the validity of the information used by the Court to enhance the punishment under the present sentence.

The question which Court should hear the evidence relating to alleged invalidity of prior presentence information and it's relationship to the present sentence has been fully considered in

Craig vs. Beto, 458 F. 2d 1131 (5th Cir. 1972); United States vs. Wendt, 435 F. 2d 187 (2nd Cir. 1970); United States vs. Lufman, 457 F. 2d 165 (7th Cir. 1972).

Once a petitioner raises the Constitutional invalidity of prior illegally, and unsound presentence information, it becomes the burden of the Government to prove the absence of any Constitutional Defect or waiver of rights---United States vs. Dushane, 435 F. 2d 187, 190 (32nd Cir. 1970).

There are many authorities involving recidivist or similar statutes in which the Court has considered and ruled on the constitutional validity of prior convictions (or invalid information) of other courts. See, for instance, Williams vs. Coiner, (4th Circuit) 392 F. 2d 210, 212; Taylor vs. United States (8th Cir. 1973) 472 F. 2d 1178, 1180; and United States ex rel Lasky vs. LaVallee, (2nd Cir. 1973) 472 F. 2d 960.

In Losieau vs. Sigler (8th Cir. 1969) 406 F. 2d 795, 802-3, cert. denied 396 U.S. 988. In reality, in this situation the Court is not invalidating the earlier State convictions but is simply invalidating the recidivist information that was constitutionally invalid, and yet used as a basis for a denial of 2255 Motion submitted showing the invalidity of the prior convictions that were used to enhance the punishment.

As in Townsend vs. Burke, 334 U.S. 736, 92 L.Ed. 1690, 68 S.Ct. 1252, "This prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue." Id., at 741, 92 L.Ed. at 1693.

In the United States vs. Brown, 470 F. 2d 285 (CA 2, 1972), the Court of Appeals made it perfectly clear that if there is anything in a report or pre-sentence report which justifies in the mind of a judge a harsh sentence, then the defense counsel should be afforded an opportunity to answer or explain these facts. See also United States vs. Malcolm, 432 F. 2d 809 (CA 2, 1970). An obvious corollary is that if a sentence is based even in part upon a false record contained in the presentence report, there may well exist a violation of due process in the sentencing procedure. United States vs. Carden, 428 F. 2d 116 (CA 8 - 1970).

One of the most important cases in this area of the law is United States vs. Weston, 448 F. 2d 626 (CA 9, 1971), cert. denied 404 U.S. 1061, 97 S.Ct. 748. In the Weston case, at the conclusion of the trial, the Court sought to impose the minimum penalty (5 years) on the defendant convicted for violation of the Federal Narcotics Law. The Government entered a strenuous objection and sought to have the Court consider a memorandum prepared by a narcotics agent. The report similar to the presentence report prepared by the Probation Department in the instant case served to preclude this appellant from a fair evaluation by the Sentencing Court, and under such conditions the appellant received a more severe sentence than that of his alleged co-defendant as a result of this 'extra-legal' erroneous presentence investigation report.

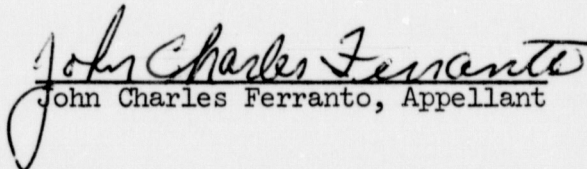
In a recent case in this circuit, United States vs. Rosner, 485 F. 2d 1213 (CA 2, 1973), this Court remanded the case for sentence anew because the sentencing court provided no opportunity for defense counsel to rebut a secret report handed to the judge.' This secret

report actually was in ~~the~~ possession of the sentencing judge for some two months prior to the actual date of sentencing. (This is the same as the instant case where an erroneous presentencing investigation report was in the Court's possession). The appellant or the defense counsel should have had an opportunity to show the erroneous information contained in the report was actual invalid. The report in Rosner consisted of accumulated conclusions and hearsay statements of various Assistant United States Attorneys which concluded with a plea of a maximum sentence. The Court, citing Mawson vs. United States, 463 F. 2d 29 (CA 1, 1972), also ruled that such a resentence must be sent to a different judge for the judge's sake and the appearance of justice.

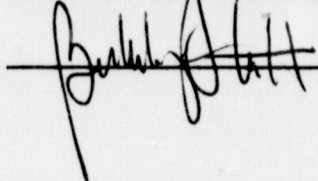
CONCLUSION

WHEREFORE, IT IS RESPECTFULLY REQUESTED THAT THIS
COURT REMAND FOR RESENTENCING CONSISTANT WITH A
SENTENCE THAT WOULD BE IMPOSED WITH VALID INFORMATION FROM A CORRECT PRESENTENCE INVESTIGATION REPORT.

STATE OF GEORGIA)
: ss
COUNTY OF FULTON)


John Charles Ferranto, Appellant

SWORN TO AND SUBSCRIBED BEFORE ME THIS _____ DAY OF APRIL, 1974.



PAROLE OFFICER.

APR 10 1974

Parole Officer: Authorized by the Act of
July 7, 1955 to Administer Oaths (18 U.S.C.
4004).

CERTIFICATE OF SERVICE BY MAIL

I, the undersigned, hereby certify that I am the Appellant in the attached Brief of Appellant, and that I have this date served a copy of the Brief on THE UNITED STATES ATTORNEY, FOR THE EASTERN DISTRICT OF NEW YORK, BROOKLYN, NEW YORK, by mailing it in a properly addressed enveloped, certified mail-return receipt requested, on this the 10 day of April, 1974.

John Charles Ferranto
John Charles Ferranto, Appellant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

F I L E D
IN CLERKS OFFICE
U.S. DISTRICT COURT E.D.N.Y.

JAN 28 1974

JOHN CHARLES FERRANTO,

Petitioner,

-against-

Memorandum of Decision
and Order

UNITED STATES OF AMERICA,

Respondent.

January 28, 1974

This court on August 9, 1973 dismissed a petition filed by John Charles Ferranto pursuant to 28 U.S.C. § 2255 which sought to overturn an allegedly illegal sentence. The petitioner's claim was based on errors and mis-statements in the presentence report. Incorporated in that memorandum of decision was a zeroxed copy of two pages of the presentence report. The first page of the incorporated portion of the report unfortunately contained a segment of a paragraph ;from the preceding page of the presentence report, as follows:

"pending against him in our Court. In essence, the defendant's statements impressed us as being unconvincing and there appears to be much more to the circumstances surrounding his involvement than he is willing to divulge.

2. PRIOR RECORD:

As a youngster, the defendant had numerous run-ins with the law for escapades ranging from running away from home to stealing automobiles. As a result of his incorrigibility he was placed in Children's Village, by the Kings County Children's Court, in September, 1945. He remained in placement at this institution until January, 1947, when he was discharged to his family's custody."

The petitioner seizes upon this as the basis for a new petition claiming that the court considered the sentence beginning "in essence." Starting at that false beginning, he then proceeds to explain away his arrests and convictions.

The memorandum of decision of August 9, 1973, in explaining the basis for the time imposed, specifically referred to "prior record." The claim was adequately dealt with in the memorandum of August 9, 1973.

The petition is dismissed and it is

SO ORDERED.

The Clerk of the Court is directed to forward a copy of this memorandum of decision and order to the petitioner.

/s/ Jacob Mishler.
U.S.D.J.

*****TRUE AND EXACT COPY*****

F I L E D
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

FEB 27 1974

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
JOHN CHARLES FERRANTO,

Petitioner,

-against-

UNITED STATES OF AMERICA,
Respondent.
-----x

No. 74-C-109

Memorandum of Decision
and Order

February 27, 1974

Motion to prosecute the appeal from the order of this
court dated January 28, 1974 is granted.

Motion for a certificate certifying that petitioner pre-
sents a substantial question for review (probable cause) is ~~denied~~
for the reasons set forth in this court's memorandum of decision
dated January 28, 1974.

SO ORDERED

The Clerk is directed to forward the file to the Clerk
of the Second Circuit Court of Appeals for review by a circuit
judge pursuant to 28 U.S.C. §§ 2253 and 2255.

The Clerk is also directed to forward a copy of this mem-
orandum of decision and order to the petitioner.

/s/ Jacob Mishler
U. S. D. J.

*****TRUE AND EXACT COPY*****

Exhibit II
-11-

84C 109

CLASH

"A"
MISNER, J

TITLE OF CASE

ATTORNEYS

For Plaintiff:

vs.

John Charles Ferranto

UNITED STATES OF AMERICA.

Pro Se

PMB. -74054-158

Atlanta, Georgia

For Defendant: 30315

BASIS OF ACTION: PURSUANT TO SEC. 2255
(Related Case Cr- 71-1138)

JURY TRIAL CLAIMED

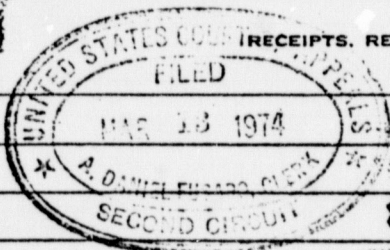
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ABSTRACT OF COSTS

TO WHOM DUE

AMOUNT

RECEIPTS, REMARKS, ETC.



1091
JOHN CHARLES FERRANTO vs. U. S. A.

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
1-21-74	MOTION TO VACATE SENTENCE (RE: 71-CR-1138)	1
1-21-74	Copy of letter of Clerk of Court filed dated Jan. 21, 1974 acknowledging application, etc.	2
1-28-74	BY MISHLER, CH. J. MEMORANDUM of Decision and ORDER FILED. THE PETITION is DISMISSED and it is SO ORDERED. The Clerk of Court is directed to forward a copy of this memo., etc., to the petitioner, etc.	3
1-29-74	Copy of letter of Clerk of Court filed addressed to petitioner herein re enclosure of a copy of memo., etc.	4
1-28-74	Letter of petitioner herein filed together with a copy of letter of Clerk of Court dated Jan. 28, 1974, etc.	5 & 6
2-7-74	MOTION FILED TO PROCEED ON APPEAL in FORMA PAUPERIS, etc.	7
2-27-74	BY MISHLER, CH. J. MEMORANDUM of DECISION and ORDER FILED. Motion to prosecute the appeal from the order of this court dated Jan. 28, 1974 is GRANTED. Motion for a certificate of Probable Cause is DENIED. SO ORDERED. The Clerk is directed to forward the file to the Clerk of U.S.C.A. etc., The Clerk is also directed to forward a copy of this memo., etc., to the petitioner.	8
3-4-74	Copy of letter of Clerk of Court filed dated March 4, 1974 addressed to petitioner herein re enclosure of a copy of memo., etc.	9
<div data-bbox="252 1425 748 1694" data-label="Text"> <p>A TRUE COPY FILED March 12 1974 LAWIS PROCEL THOMAS R. BARTO CLERK OF COURT</p> </div>		